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No. 17574

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF OREGON, acting by and through its
State Forester, and KLAMATH FOREST PRO-
TECTIVE ASSOCIATION, an Oregon nonprofit
corporation,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal From the United States District Court
for the District of Oregon**

APPELLANTS' BRIEF

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**Appeal From the United States District Court
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APPELLANTS' BRIEF

**STATEMENT OF JURISDICTION OF UNITED
STATES DISTRICT COURT**

This is an appeal by the State of Oregon and Klamath Forest Protective Association, an Oregon nonprofit corporation, from that order of the United States District Court for the District of Oregon which dismissed the second amended complaint of plaintiffs, and the action stated therein, due to lack of jurisdiction of the court (R. 53-54).

The order for dismissal was entered by the District Court on its own accord after the court had considered

and denied a motion for summary judgment filed by the defendant (R. 53-54).

By the second amended complaint (R. 13-15), brought under the Federal Tort Claims Act, 28 U.S.C.A. Sec. 1346(b), 2671 to 2680, the plaintiffs sought to recover the expenses incurred in fighting, controlling and extinguishing an uncontrolled fire on forest lands in the State of Oregon.

In paragraph II of the second amended complaint (R. 13) plaintiffs allege that:

“Plaintiff State of Oregon is acting by and through the duly appointed and authorized State Forester of Oregon.”

In paragraph III of the second amended complaint (R. 13) plaintiffs allege that:

“Plaintiff Klamath Forest Protective Association is an Oregon nonprofit corporation duly registered and authorized to do business in the State of Oregon.”

In paragraph IV of the second amended complaint (R. 13-14) plaintiffs allege that:

“ . . . servants, agents and employees of the Forest Service Department of Agriculture, United States of America, while acting within the course and scope of their employment, negligently and carelessly set a forest fire, which forest fire they then negligently and carelessly permitted to escape and burn into the State and District of Oregon as hereinafter stated.”

In paragraph VI of the second amended complaint (R. 14) plaintiffs allege:

“That defendant failed, neglected and refused to

control and extinguish said fire in the State and District of Oregon.”

In paragraph VII of the second amended complaint (R. 14) plaintiffs allege that:

“As approximate result of said negligence and carelessness the plaintiffs were required to . . . and did so fight, control and extinguish said fire”

And it is further alleged in paragraph VIII of the second amended complaint that:

“. . . plaintiffs suffered damage in the sum of \$26,999.41, being moneys expended by plaintiffs to fight, control and extinguish said fire on forest lands in the State of Oregon.”

On defendant’s motion for summary judgment, the court denied the motion of defendant, but ordered a dismissal of the complaint and action as aforementioned (R. 53-54). The reasons for dismissal were detailed in the opinion of the court (R. 49-52).

Jurisdiction to hear and determine such cause of action is conferred on the United States District Court under the provisions of 28 U.S.C.A. Sec. 1346(b) which reads as follows:

“(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused

by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

JURISDICTION OF COURT OF APPEALS FOR NINTH CIRCUIT TO HEAR THE APPEAL

On June 26, 1961, the district court entered its order of dismissal on the ground of lack of jurisdiction over the subject matter (R. 53-54). August 25, 1961, plaintiffs filed their notice of appeal (R. 55) from the order of dismissal entered by the United States District Court for the District of Oregon.

Jurisdiction is conferred on this court to review said order of dismissal under the provisions of 28 U.S.C.A., Sections 1291 and 1294(1).

STATEMENT OF CASE

The United States Forest Service, an agency of the defendant United States of America, set fire to lands located in the vicinity of Bogus Creek area in the County of Siskiyou, State and Northern District of California (R. 13). The fire was set by the servants, agents and employees of the United States, while acting within the course and scope of their employment (R. 13). The fire escaped and burned over an area of Northern California, and into forest lands in the State and District of Oregon.

The fire burned uncontrolled into the State of Ore-

gon (R. 14); the United States failed to take action to prevent the spread of the fire (R. 14) in Oregon.

Klamath Forest Protective Association and the State of Oregon, the latter by and through its State Forester, incurred expenses in the sum of \$26,999.41 in controlling and extinguishing that part of the fire which had burned uncontrolled into the State of Oregon (R. 12, 14).

The United States failed to exert an effort to suppress and extinguish the fire which burned on the lands in the State of Oregon. The fire burned over both private and federal lands in the State of Oregon. The federal lands were under the jurisdiction of the Department of the Interior of the United States, and are commonly referred to as "O. & C." lands or Bureau of Land Management lands; the private lands, in part, were owned by members of plaintiff Klamath Forest Protective Association (R. 3-12).

On June 23, 1959, the original complaint was filed against the United States of America alleging negligence of defendant in the setting and control of Bogus Mountain Fire. By the complaint, under the aforementioned Federal Tort Claims Act, plaintiffs sought to recover the expenses incurred by them in fighting, controlling and extinguishing the fire on forest lands in the State of Oregon.

On November 29, 1960, the second amended complaint was filed (R. 15). The action was based upon Oregon law, with particular reference to ORS chapter 477, and 477.064 to 477.071.

The defendant filed a motion for summary judgment

(R. 15, 16); thereafter, on June 26, 1961, the district court denied the motion, but on its own initiative determined the court lacked jurisdiction and entered its order of dismissal of the second amended complaint (R. 53-54). The court had prefaced its order by an opinion issued June 22, 1961 (R. 49-52). By its opinion the district court made reference to and in effect adopted the ruling of Judge Louis E. Goodman, United States District Court for the Northern District of California (Southern Division), entered on June 1, 1961, in the case entitled "People of the State of California, Plaintiff, vs. United States of America and First Doe to Twentieth Doe, both inclusive, Defendants" (R. 52), which case is also on appeal in this court by the State of California (CCA, No. 17534).

The question on appeal is whether the Federal Tort Claims Act subjects the United States to liability for the fire-fighting expenses incurred by plaintiffs in suppressing and extinguishing a forest fire negligently set by the United States on Federal lands in the State of California and allowing the fire to escape and burn to and upon forest lands in the State of Oregon. The plaintiffs hereinbefore mentioned are now appellants.

SPECIFICATION OF ERROR

1. The district court erroneously held that the Federal Tort Claims Act does not confer jurisdiction upon it to adjudicate the claim of plaintiffs for fire suppression costs against the defendant United States, and in so doing, erred in dismissing the second amended complaint and cause of action of plaintiffs.

SUMMARY OF ARGUMENT

The cause of action stated by the State of Oregon and Klamath Forest Protective Association, and the claim of \$26,999.41 asserted therein against the United States of America, are within the purview of the Federal Tort Claims Act. The following is a summary of argument:

1. The uncontested facts of the second amended complaint and the answers to the written interrogatories reveal negligence in the origin, escape and control of Bogus Mountain Fire.

2. The admitted negligence of the United States is within the scope and provisions of the Federal Tort Claims Act.

3. The rule of *lex loci delicti* is applicable to the facts of the case, thereby a tort was committed within the District and State of Oregon.

4. The Oregon laws authorize collection of the fire suppression costs against a person who wilfully or negligently originated a fire or permitted a fire to burn uncontrolled on forest land in Oregon.

5. The fire suppression efforts of the State of Oregon and Klamath Forest Protective Association were done in order to protect, and to prevent continued damage to, property and natural resources in Oregon.

ARGUMENT

This appeal brings an important issue to the appellate court, namely, whether or not an action may be brought against the United States under the Federal Tort Claims Act for the recovery of fire suppression costs incurred

by the appellants due to a fire burning uncontrolled on forest land in Oregon, which fire was negligently set and allowed to escape by the officials and employees of the United States.

1. The uncontested facts of the second amended complaint and the answers to the written interrogatories reveal negligence in the origin, escape and control of Bogus Mountain Fire.

In its decision, the lower court ignored the facts set forth in the complaint and answers to the written interrogatories. The facts, for purposes of the question before the lower court, were uncontested.

The second amended complaint clearly states that the United States negligently and carelessly set a fire which was allowed to escape and burn onto forest lands in the State and District of Oregon (R. 13-14). Further, the complaint sets forth the uncontested allegations that the United States failed and neglected to control and extinguish that part of Bogus Mountain Fire which burned into Oregon (R. 14).

The motion for summary judgment required an admission of the alleged facts by the United States. Similarly, the lower court by its own notice and decision was required to review the alleged facts as admitted.

For all purposes of this appeal, the tort of the United States is revealed. Appellants assert their claim for \$26,999.41 against the United States, based upon the admitted allegations of tort liability. The State of Oregon and Klamath Forest Protective Association were required by Oregon Revised Statutes, chapter 477, here-

after fully cited by pertinent provisions, to fight, control and extinguish that part of Bogus Mountain Fire which burned into Oregon; the requirement was based upon the failure and neglect of the United States to do any effort on the fire. Therefore, this action was brought by appellants against the United States under the provisions of the Federal Tort Claims Act: 28 U.S.C.A., Sec. 1346(b), 2671 to 2680 (R. 13).

The allegations of the second amended complaint assert that the “. . . plaintiffs suffered damage in the sum of \$26,999.41, being moneys expended by plaintiffs to fight, control and extinguish said fire on forest lands in the State of Oregon.” (R. 14) By its opinion the lower court was fearful that it lacked jurisdiction because the allegations of the complaint and answers to the interrogatories did not reveal that the appellants sustained damage to property. As will be later shown, appellants incurred the fire suppression costs in order to protect property and natural resource values. The latter was not considered by the lower court and it erred in failing to do so.

2. The admitted negligence of the United States is within the scope and provisions of the Federal Tort Claims Act.

By the Federal Tort Claims Act, Congress has changed the concept of sovereign immunity in so far as the United States is concerned. In essence, the enactment provides for civil actions against the United States for injury or loss of property, or because of personal injury or death due to negligence or wrongful act or omission of any

employee of the Federal Government while acting within the scope of the office or work—provided such was under circumstances where the United States, if as a private person, would be liable in accordance with the law of the place where the act or omission occurred: *Wiltse v. United States*, 74 F. Supp. 786; *Lavitt v. United States*, 177 Fed. 2d 627. In *Jones v. United States*, 126 F. Supp. 10, 228 Fed. 2d 52, 97 U. S. App. D. C. 81, the court asserted that the federal statute was remedial in nature and was intended to waive the sovereign immunity in the field of tort; the statute did not create a new cause of action but merely under stated circumstances made the United States liable in the same way and extent as a private individual: 1 ALR 2d 224, citing *Jones v. United States*, *supra*.

Although courts have given the Federal Tort Claims Act a literal and narrow construction, yet there have been an equal number of courts that have avowed that the Act should receive a liberal construction because of its benevolent purposes: *Bates v. United States*, 76 F. Supp. 57; *Panella v. United States*, 216 Fed. 2d 622.

As revealed above, there are exceptions to actions which may be brought against the United States: 28 U.S.C.A. Sec. 2680. However, the present action is within the scope of the Federal Tort Claims Act, as the negligence and carelessness of the officials and employees of the United States was the proximate cause of the damages sustained by the appellants, namely, \$26,999.41 expended by the appellants in fighting, controlling and extinguishing Bogus Mountain Fire on forest lands in Oregon.

The state law governs when the cause of action comes into existence: *Bizer v. United States*, 124 F. Supp. 949. The substantive law of the place where the tort occurred is to be applied: *Hess v. United States*, 259 F. 2d 285, 358 US 923, 79 S. Ct. 604, 3 L. Ed. 2d 627. Under the allegations set forth in the second amended complaint of appellants, Oregon law is applicable to the acts and omissions of the United States in originating Bogus Mountain Fire and in the failure and neglect of the United States to fight, control and extinguish the fire on forest lands in Oregon.

3. The rule of *lex loci delicti* is applicable to the facts of the case, thereby a tort was committed within the District and State of Oregon.

The rule under the Federal Tort Claims Act compelled Congress under practical procedures to adopt the principles of local law to define tort liability; therefore the rule of *lex loci delicti* should be reviewed. Both in Oregon and in other jurisdictions the rule is as set forth in Restatement of Conflict of Laws, Sec. 377:

“The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”

The above rule was stated in *Jordan v. State Marine Corporation of Delaware, et al*, 257 Fed. 2d 232, wherein it was held that the place of wrong is the state in which the *last event* is necessary to make the actor liable for the alleged tort; also, *Otey v. Midland Valley R. Co.*, 108 Kan. 755, 197 P 203. In the latter case the barn of the plaintiff in Oklahoma caught fire allegedly from

sparks of defendant's engine; the defendant claimed that if the fire was set by a spark which escaped from the engine in Kansas, there would be no recovery; the court stated:

"Such is not the law. . . . a recovery was proper whether the engine was in Kansas, or on the state line, or in Oklahoma. The damage occurred in Oklahoma. If it was caused by defendant's engine, that was all that was necessary"

A similar situation as in the Otey case arose in *Connecticut Valley Lumber Co. v. Maine Central Railroad*, 78 NH 553, 103 A 263, wherein the court stated:

"While the defendant's negligent acts occurred in Canada, the resulting injury to the plaintiff's property occurred in this state. If one, while in one jurisdiction, performs a negligent act which is the proximate cause of damage to property in another jurisdiction, the locality of the act is deemed at common law to be the same as that of the damage."

Also in *Dallas v. Whitney*, 118 W. Va. 106, 188 SE 766, the court confronted with the *lex loci delicti* problem concluded:

"The rule seems to be that where a cause is put in motion in one jurisdiction that results in injury in another, the law of the latter jurisdiction is the law by which the substantive rights of the parties are to be determined."

The second amended complaint alleges that Bogus Mountain Fire originated through the negligence and carelessness of the United States. Under the above cited cases and rule, the event which caused the liability

of the United States to the appellants occurred when and after the fire burned into Oregon. In so far as the claim of appellants set forth in the second amended complaint, Oregon law governs the rights and liabilities of the parties to this action. See *Jordan v. State Marine Corporation of Delaware*, 257 Fed. 2d 232, *supra*; also, *Nadeau v. Power Plant Engineering Co.*, 216 Or 12, 17, 337 P2d 313. See 133 ALR 260 wherein it is stated that the law of the situs of the tort governs the liability therefor, and on page 266 of said annotation is cited *Connecticut Valley Lumber Co. v. Maine Central Railroad*, *supra*. Further, see *United States v. Marshall*, C.A. Idaho (1956) 230 F. 2d 183.

In the present action the alleged negligence in the origin of Bogus Mountain Fire, as aforementioned, was a continuing act of negligence causing injury and damage to appellants in Oregon.

4. The Oregon laws authorize collection of the fire suppression costs against a person who wilfully or negligently originated a fire or permitted a fire to burn uncontrolled on forest land in Oregon.

The action brought by the State of Oregon and Klamath Forest Protective Association is based upon the provisions of ORS chapter 477, particularly ORS 477.002 and ORS 477.064 to 477.071. The statutes define forest lands and require the owner to fight and extinguish fires occurring thereon: ORS 477.066. A fire burning uncontrolled on forest lands without proper action being taken to prevent its spread is a public nuisance: ORS 477.064. When the public nuisance exists,

the State of Oregon is required to fight, control and extinguish the fire: ORS 477.066. If the fire originated through negligence of an owner, or if the owner fails, refuses or neglects to make a reasonable effort to control and extinguish such fire, the costs of the state may be collected by an action at law from the owner: ORS 477.068. See *State v. Gourley Bros. et al*, 209 Or 363, 305 P2d 396, 306 P2d 1117; *State v. City of Marshfield*, 122 Or 323, 259 P 201. Also, see *State v. The California-Oregon Power Co.*, 225 Or 604, 358 P2d 524.

For the convenience of the court, the Oregon statutes are hereinafter set forth:

ORS 477.002 (1) (d) "Forest land" includes any forest, woodland, brushland, cutover land, slashing, chopping or clearing containing any inflammable forest debris.

ORS 477.064 Any fire on any forest land in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life and property. The spread of fire in forest land across an ownership boundary is prima facie evidence of fire burning uncontrolled.

ORS 477.066 The owner, operator and person in possession of land on which a fire exists, or from which it may have spread, or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, warden or ranger and shall continue until the fire is extinguished. If the owner or operator or person in pos-

session fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective agency under contract with the State Board of Forestry for the protection of forest land against fire, and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

ORS 477.068 (1) In case such owner, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession when necessary by action for debt prosecuted in the name of the State of Oregon or such forest protective agency or both.

(2) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, but the lien shall be limited to the real and personal property situated within the external boundaries of the area over which the fire has burned. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for foreclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

(3) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated shall prosecute such action for debt or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens provided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same.

ORS 477.069 Notwithstanding ORS 16.220 and 16.230, or any other law, in the instance of a fire occurring as described in ORS 477.064, or any other fire or spot fire therefrom, wherein the owner, operator or person in possession, or any of them, has been wilful, malicious or negligent in the origin of the fire and also has failed to make the effort required by ORS 477.066, the plaintiff, in bringing the action authorized by ORS 477.068, may unite in the same complaint such causes permitting collection of the cost incurred by the plaintiff under ORS 477.066. The provisions of this section shall not apply to any acts, omissions, actions, suits or proceedings occurring or commenced prior to April 19, 1957.

ORS 477.070 If the owner regularly pays a fire patrol assessment on the lands described under ORS 477.068 or is a member in good standing of an organization approved by and under contract with the board, which organization has undertaken the control and suppression of fires on such land and which is actually engaged in the control and suppression of fire entering upon or burning on such land, the owner, operator or person in possession shall not be subject to the penalties prescribed by ORS 164.070, or be held as maintaining a nuisance as defined in ORS 477.064, unless he or his agent is wilful, mali-

cious or negligent in the origin of the fire. But payment of fire patrol assessments or membership in an organization under contract with the board shall not relieve any owner, operator or person in possession of land from the obligation imposed by ORS 477.066 and 477.068 to control and prevent the spread of fires if that land has theretofore become an operation area and if, as a result thereof, an additional fire hazard has been created and exists thereon and has not been released by the forester.

ORS 477.071 For the purpose of ORS 477.066, notification to the owner, operator and person in possession of the land, or any of them, shall be considered good and sufficient notice to the owner of the existence of a fire.

The above statutes sound in tort. Such has been the long interpretation of the Oregon Supreme Court: *State v. City of Marshfield*, 122 Or 323, 259 P 201, 259 P 203; *State v. Gourley Bros. et al*, 209 Or 363, 305 P2d 396, 306 P2d 1117. See also, *State v. The California-Oregon Power Co.*, 225 Or 604, 358 P2d 524.

Liability under the cited Oregon statutes is a tort liability, even though the statutes refer to an action of debt. The last cited cases substantiate this argument. By its omissions and acts, the United States becomes responsible to the State of Oregon, and its contracting fire protective agency, for the costs incurred by the state and agency in fighting and extinguishing Bogus Mountain Fire. A private person would be liable in similar circumstances, and as a consequence of the Federal Tort Claims Act, the appellee United States is rendered responsible.

The lower court erred in ignoring the decisions of the Oregon Supreme Court cited above, and in failing to consider the tort liability of the United States under the above Oregon laws.

5. The fire suppression efforts of the State of Oregon and Klamath Forest Protective Association were done in order to protect, and to prevent continued damage to, property and natural resources in Oregon.

Although the action and claim of the appellants is for fire suppression costs, none the less, each appellant has an interest in the forest lands and natural resources which were burned or threatened by Bogus Mountain Fire. The lower court erred in overlooking such property interests.

(a) Forest land interests of the appellants:

Referring to Oregon Revised Statutes, chapter 477, particularly ORS 477.033, the state and association are entitled to budgeted costs for providing protection of forest lands from fire. The court may take notice that ORS 477.033 authorizes the costs of such protection to become a lien upon the forest lands involved. The lands are those for which the owner has neglected and failed to provide proper protection against fire: ORS 477.022 to 477.055. In effect, the statutes of the State of Oregon give a lien interest in forest lands of a fire protection district. The lien interest may be foreclosed "like taxes": ORS 477.033.

The lien interest is derived as follows.

Under the provisions of ORS 477.022, as such existed

at the date of Bogus Mountain Fire, unprotected forest land is not authorized; the statute states in full:

“The preservation of the forests and the conservation of the forest resources through the prevention and suppression of forest fires hereby are declared to be the public policy of the State of Oregon. To achieve this end the need for a complete and coordinated fire protection system is acknowledged.”

Also, under the provisions of ORS 477.024, every owner of forest land “. . . shall provide adequate protection against the starting or spread of fire thereon or therefrom which protection shall meet with the approval of the board.” The unquoted parts of ORS 477.024 require the State Forester of Oregon to provide fire protection for those lands neglected by the owner. Under ORS 477.026, the State Forester establishes fire protection districts in order to set up the protection required of him by ORS 477.024. Each year the State Forester and Oregon State Board of Forestry estimate the cost of such protection and cause the cost to be levied and assessed, “like taxes”, against the forest lands involved: ORS 477.030 to 477.035. Such cost so levied are a lien upon the privately owned property: ORS 477.033. Thus, at the time Bogus Mountain Fire raged uncontrolled onto forest lands in Oregon, by statute the State of Oregon had an interest in the forest lands. In those instances where assessments were not levied, then Klamath Forest Protective Association was involved with land interest, namely, association members owned forest lands burned or threatened. References to statutes and land ownership are a part of this court record (R. 3-12, 51). The

uncontrolled nature of Bogus Mountain Fire in Oregon and the failure of the United States through its servants, agents and employees of the Forest Service, Department of Agriculture, (R. 13) to exert any effort to fight and control the fire in Oregon (R. 14), was the direct reason and proximate cause for appellants incurring \$26,999.41 fire suppression costs. The costs were incurred for the protection of the forest lands and interests therein of appellants.

The Oregon Supreme Court made an analysis of the predecessor statute to ORS 477.022 to 477.055. In *First State Bank v. Kendall*, 107 Or 1, 213 P 142, the court stated on page 9:

“The general object and purpose of this act was to prevent the destruction by fire of the forest lands within the state. *To accomplish this purpose all private owners of forest lands are required by this act to maintain a fire patrol over their lands during the dry season of each year.* Recognizing that some timber land owners might not comply with the law, the legislature properly included in the act a provision whereby, *through the state forester, a system of patrolling such private lands could be maintained at the expense of the delinquent land owner, and provided a method whereby this expense could be collected from such owner.* As the means thus adopted tended to prevent the destruction of forests by fire, and was essential to the accomplishment of the purpose of the act, it was proper to include this provision in the act. Without some such provision, obedience to the law could not be enforced.” (Emphasis supplied)

The Oregon court further stated in the Kendall case on page 12:

“Under this statute every owner of timber lands within the state is commanded to patrol them during the dry season of the year, when fires are liable to occur. If any owner fails to patrol his own lands, it is made the duty of the state forester to furnish a fire patrol therefor. The law provides that the amount of the expense of the state forester in patrolling privately owned lands, which the owner has failed or neglected to patrol, shall be reported by the state forester to the appropriate County Court, and that this amount shall be extended on the assessment-roll of the county and shall become a lien upon the lands so patrolled, and that this amount shall be collected in the same manner and at the same time that taxes are collected, and when collected, shall be repaid to the state forester, and makes the procedure applicable to the collection of taxes and delinquent taxes applicable to the collection thereof.”

Because of the nature of the statute, it has been referred to as the Compulsory Forest Patrol Act of Oregon. The court in the Kendall case further stated on page 13:

“ . . . This statute was not designed for the purpose of raising revenue, and its enactment was not an exercise of the taxing power of the state. The act is a reasonable and proper police regulation designed to protect the forests of the state from destruction by fire. The method adopted by the legislature to compel the delinquent owner to reimburse the state for the moneys so expended provides merely for the collection of an indebtedness imposed under

the police power of the state, and not the collection of a tax.”

From the above citations and quotations it is obvious that the State of Oregon has an interest in forest lands in order to regain its costs of protection. It was such an interest in property that the Bogus Mountain Fire damaged and threatened to burn. Contrary to the lower court opinion (R. 49), the appellants did have property interests which were damaged and threatened by the fire negligently started and permitted to escape by appellee. The lower court failed to consider the nature and scope of the pertinent Oregon statutes.

(b) Natural resources were damaged and threatened:

The court may take notice that the State of Oregon has a property interest in its natural resources. Trees, forests, watershed areas, fish and wildlife are threatened by a fire in forest lands burning uncontrolled. Both appellants were committed to the protection of such resources. The fire suppression costs incurred by appellants in fighting Bogus Mountain Fire were expended to prevent further damage to such resources. This factor the lower court fully ignored. The lower court declared an absence of property damage (R. 51). It was in error.

Oregon has affirmed its right in water and watershed resources: ORS, chapters 536 and 537. Also, Oregon has exerted its rights over fish and wildfowl and wild animals: ORS, chapters 496 to 505. The Oregon court has acclaimed such rights in several decisions, particularly

in *State v. Blanchard*, 96 Or 79, 189 P 421, where on page 87 the right was affirmed:

“The argument also ignores the repeated decisions of our own and other courts, that nobody has an absolute right to fish in the waters of this state; that the property in fish, abounding in the waters of this state, so far as they can be said to be property, is in the state in trust for the people, and, so long as it does not discriminate between citizens, the legislature may prescribe the time in which and the method by which the fish may be taken, and the waters from which they may be taken.”

The Oregon court reaffirmed the right of the state in *Anthony et al. v. Veatch et al.*, 189 Or 462, 486, 220 P2d 493, 221 P2d 575, 71 S.Ct. 499, 340 U.S. 923, 95 L.Ed. 667. Other Oregon decisions relating to wild game: *Thompson v. Dana*, 52 F.2d 759, 285 U.S. 529, 76 L.Ed. 925; *Fields v. Wilson*, 186 Or 491, 207 P2d 153.

It is here asserted that the action taken by appellants in fighting, controlling and suppressing that part of Bogus Mountain Fire in Oregon was for the preservation and protection of natural resources in Oregon. The sum of \$26,999.41 was so incurred. It is a proper amount to assert against the United States under the previously cited provisions of the Federal Tort Claims Act.

CONCLUSION

In view of the above-cited arguments and authorities, appellants urge the order of the lower court be overruled and reversed on this appeal; and further, that said cause

of action and claim of plaintiffs be deemed within the purview of the Federal Tort Claims Act.

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Respectfully submitted,

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